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Supreme Court of the United States

No. 472

THE UNITED STATES OF AMERICA for the Use and Benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff-Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO. INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO. INC.,

Plaintiff Respondent,

against

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Defendant-Respondent,

and

OVE GUSTAVSSON CONTRACTING CO., INC.,

Petitioner and Intervenor-Appellant.

PETITION FOR A RE-HEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE THE CHIEF-JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of Regularity

The petitioner, above-named, respectfully prays this Honorable Court to grant a re-hearing on the order of this Court denying its petition for a writ of certiorari.

The order denying the petition for a writ of certiorari (with Mr. Justice Black dissenting) was made by this

Court on or about December 17, 1962. Time to file this petition for re-hearing was extended by order of Mr. Justice Harlan dated January 7, 1963, to and including February 8, 1963 and pending at this writing is petitioner's application for a further extension of several days more to encompass the time that will be needed to print, serve and file this petition.

Prior Proceedings

This suit is by a materialman under the Miller Act [40 U.S.C.A. 270(a) and (b)] for the agreed price of about $19,000 for lumber it agreed to manufacture and deliver to petitioner against which petitioner sought to defend and to assert a counterclaim for about $23,000 for use—plaintiff's breach of the same contract. Petitioner entered this litigation by way of the Intervention statute (Rule 24 of the Rules of Federal Civil Procedure) because the materialman had named only petitioner's surety as defendant.

Petitioner moved the District Court for permission to intervene and wrote across its intended pleading, that petitioner demanded a "trial by jury" (2s).* The District Court granted intervention but required petitioner to waive a trial by jury (8s, 9s). Petitioner waived a jury trial but reserved its right to a review of said direction to waive a jury trial (10s). After an ensuing trial before the court without a jury, judgment was awarded plaintiff for the amount of its claim and all of petitioner's counterclaims but for $350 were dismissed. This decision of the Trial Court was without support in the evidence.

Petitioner appealed claiming among other errors the District Court's order directing a waiver of trial by jury. The Court of Appeals affirmed the judgment and respect-

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* References are to pages of the appendix to the Petition for a Writ of Certiorari.

ing the order of the District Court directing the waiver of a jury trial, it affirmed that order on grounds found, *sua sponta*, it denominated "peculiar" to this case.

Point Involved

The ground of this petition is, as indicated by Rule 58 of the Rules of this Honorable Court, a ground which was not before submitted and apparently not considered heretofore but important enough to be considered.

The new ground may be stated in the following question:

> "If a right of trial by jury is guaranteed by the United States Constitution to every litigant in the Federal Courts (assuming a common law action to recover more than $20) then how is that right to be realized if the Supreme Court will not take cognizance of an appeal which has as its fundamental question an unlawful denial of that right?"

Argument

Perhaps the question put is not entirely appropriate but it contains the germ of the idea which struck the petitioner upon learning that its petition for certiorari was denied by this Court. Unfortunately, the Court's reasons or grounds for the denial are unknown and consequently, it is impossible to argue with respect thereto. It did strike petitioner, however, that if a jury trial is a guaranteed right of every person who is forced into Federal Court to litigate questions of fact in matters where the right of trial by jury is preserved by the Seventh Amendment of the United States Constitution, that such right can be realized only, if the performance of the guarantee is assured. Only then, can it be said that the constitutional guarantee is truly a guarantee. Without extending to the people the means to secure that guarantee, the guarantee would be meaningless.

Whose duty or function is it to preserve to the individual the right of trial of jury? It is commonly thought that such function or duty is that of the Supreme Court. This thought appears to follow logically from the judicial powers granted to the Supreme Court by the United States Constitution. Article III, Section 1 provides that "The judicial power of the United States shall be vested in one Supreme Court," and Section 2 states "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of this United States etc.". It would follow therefore, that if the question arises as to who in the United States Government is supposed to see to it that this guarantee is performed, it will be seen that the Constitution by the statement of the judicial powers has ordained and consituted the Supreme Court as the enforcer or the one who is to deliver and realize for a litigant in the United States courts this right of trial by jury. See for example *Muskrat* v. *U. S.*, 219 U. S. 346.

Reverting to the adoption of the Constitution and the considerations given by the Constitutional Convention to the matter of a jury trial in civil cases, it is now a matter of history that although, as originally proposed, the United States Constitution guaranteed the right of trial by jury only in criminal cases, the failure to provide a similar guarantee in a civil case met with serious objections in the convention. There was a general demurrer in the convention to the omission. That discontent was expressed sufficiently to have caused the Seventh Amendment to be adopted. The right of trial by jury is now recognized in civil cases. This Court said in *Parsons* v. *Bedford*, 3 Pet. 433, "That one of the strongest objections originally taken to the Constitution was the want of an express provision securing the right of trial by jury in civil cases". It said further, "That the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy".

This cherished right is one that cannot be altered except by the people in their collective capacity after careful and deliberate action. See Proffatt "Trial by Jury"; Section 84 at page 446.

This Court has also held that this right is a substantive right which should not be enfringed.

Baltimore & Caroline Line v. *Redman*, 295 U. S. 654, 657;
Patton v. *U. S.*, 281 U. S. 276, 312;
Foust v. *Munson S. S. Lines*, 299 U. S. 77, 84;
Diederich et al. v. *American News Co.*, 128 F. (2) 144.

We ought not to call Constitutional guaranties a mere privilege as was done in the *Patton* case although under the circumstances of that case all this Court did was to hold that a party may waive the privilege. The Court did not have to change the concept of a guarantee to one of privilege. Actually no difference would exist between a guarantee and a privilege if each expresses the recognition of a right possessed. Hence, calling the right a privilege does not effectively downgrade it.

The direction of the District Court to petitioner to waive a jury trial is violative of the Constitution.

In re Debs, 158 U. S. 564, 594-595;
Boyd v. *U. S.*, 116 U. S. 616, 635.

It is assumed that this Court would not downgrade this important right. Then why did it refuse to review the actions of the courts below denying the right to petitioner? Why did it not perceive that it had a duty in this case to deliver the guarantee of the Constitution to petitioner? Was it the waiver which petitioner had signed? The right was required to be waived by the Court and in this, the Court abused its power. Neither the Seventh Amendment

nor the Intervention Statute give the court the right to require the waiver. The requirement of a waiver in this case can be likened to the compulsory reference cases in which this Court has consistently held that it is unlawful if such compulsory reference is made to determine fact issues in common law suits. See *Ex Parte Peterson*, 253 U. S. 300.

Courts should indulge in every reasonable presumption against a "waiver" of this fundamental right. Nor ought they to presume acquiescence in the loss of that right.

Johnson v. *Herbst*, 304 U. S. 458, 464;
Hodges v. *Easton*, 106 U. S. 408, 412;
Slocum v. *New York Life Insurance Co.*, 228 U. S. 364, 384;
Aetna Ins. Co. v. *Kennedy*, 301 U. S. 389, 393.

Nor may the right be waived by merely going to trial after due demand and a denial of the right by the Court. Unfortunately, there are no cases of this description decided by this Court, although there are cases in the Circuit Courts.

Special School District v. *Jones* (8th Cir.), 250 Fed. 440;
Bass v. *Hoagland* (5th Cir.), 172 F. (2) 205;
Sutton v. *Johnson Cott Co.* (4th Cir.), 114 F. (2) 302;
Smyth Sales v. *Petroleum H. & P. Co.* (3rd Cir.), 141 F. (2) 41;
Monolith v. *R.F.C.* (9th Cir.), 240 F. (2) 444.

There is no question about the fact that the trial court in this case did require that petitioner waive its right to trial by jury as a prerequisite to its intervening in the case. See also pages 8s and 9s of the prior petition. The waiver as signed is to be found on page 10s. The waiver was expressly made without prejudice to the right of the inter-

venor to claim that action of the court to be erroneous. The petitioner believed that this protected its right of jury trial. The fact that a trial was later had would not cure the first error of the trial court in denying a trial by jury. *In re Debs, supra; Boyd* v. *U. S., supra.* At least, there are no cases that are decisive of the specific factual point and the cases which held that participation in a trial without a jury effectuates a waiver of the right of trial by jury are cases in which the party voluntarily participated in the trial without preserving its right as was sought to be done in the written waiver filed in this case. It can very well be argued that the appellees here could have obviated the condition upon which the waiver was made by petitioner by consenting to a trial by jury. The situation (trial in an unconstitutional manner) was not of this petitioner's making, but of appellee's making. There was no desire upon the part of the petitioner to delay the trial. It had not expressed itself as wanting a jury trial for the purposes of delay and there is no evidence that it refused to go to trial with a jury at the same time that the case appeared on the calendar for trial without a jury.

It would appear, too, that the published decisions in this case which are now authority for the rule that a jury trial may be taken from a litigant when the case has "peculiar" circumstances, even though the case be a law case and one of those that commonly would be tried to a jury upon the demand of a party. That rule might lead to other incursions upon constitutional rights. Just imagine what some of the judges would think "peculiar" to authorize them to deprive a party of a constitutional right and there will be no "safe" constitutional guarantee. The frustration of the very purposes of the Constitution would be complete. The decisions below in this case can also be said to be an exception to the constitutional right of trial by jury. If exceptions do exist there can be no stopping other minds arriving upon other exceptions which those minds might feel satisfied their judicial discerment. Thus instead of

government by law, we would have government by the personal code of the individual incumbent of judicial office. Nothing could be more foreign to our concept of judicial administration. Yet, the decisions in this case could be looked upon as a milestone in the erosion of constitutional rights, which brings into play Sections 1 and 2 of Article III of the Constitution which is set forth above. A constitutional guarantee is supposed to be a guarantee. It steadfastly belongs to the people. Who can insure the realization of those guarantees for the people? As is set forth hereinabove, it is respectfully submitted that the Constitution has specifically appointed this Honorable Court as the keeper of those guarantees. This Court was entrusted with the sole judicial power by the Constitution. Congress can create other courts, but the one court created by the Constitution in which the judicial power of the United States was vested was this Honorable Court. Being vested with judicial power generally, means more than just judicial power over particular subject matters and particular personalities. It also means that it shall be the duty of the trustee of that power to interpret the law and the Constitution and to re-establish the guarantee if it should be taken from a litigant. To this extent, it is the enforcer of the constitutional guarantees. Consequently, where there is a clear right brought to the attention of this Court which has been abridged by mistaken findings of facts of the courts below, it is respectfully submitted that thereby a situation arises for this Court to use its trustee powers to enforce the right for the litigant. The denial of the petition for a writ of certiorari as in this case when a question of fact arises between the lower court and the litigant affected is, or at least, it can be said to be unconstitutional. This Court is the final arbiter, the constitutionally appointed arbiter. Why then refuse even the right of review to a litigant who without fault on his part, has been deprived of a constitutional right? The heavy burden of the business of the Court cannot be the reason. On certiorari this

Court might stop to question whether it is obliged to grant a petition whenever a constitutional question appears. Here, without answering that question, it is respectfully submitted that it would be sufficient cause for review if it were made to appear that a question of fact had arisen as to whether there are particular circumstances which would make it right to deny that privilege to this litigant. Perhaps this Court has passed upon the sufficiency of the facts which would be submitted by the petitioner in support of its claim for a jury trial. If it has and nevertheless it has denied the writ for certiorari, then presumably there is nothing further this petitioner can do. However, it is submitted that the facts should be fully submitted and argued to the Court because this petitioner feels strongly that the facts do not support the conclusion made by the Honorable Court of Appeals that there were "peculiar" circumstances to justify the direction to waive the jury. This, nevertheless, was direction and it cannot be equated with the voluntary waiver of the litigant. Nevertheless, the so-called facts upon which the Court of Appeals relied are disputed by the petitioner in the sense that they do not exist at all but were only surmised by the Court of Appeals and, therefore, they were not sufficient to support that Court's finding. The District Court in making its direction did not rely upon any "peculiar" circumstances. It wasn't concerned with any "peculiar" circumstances and did not mention "peculiar" circumstances in its decision. It proceeded to direct the waiver of a jury trial only because it thought it had the lawful right to do so. These two judicial actions differing in their approach to the direction depriving petitioner of its right to a jury trial cannot be accepted as though a question of fact had been twice determined against the petitioner. The decisions are quite contradictory to each other and the Court of Appeals' decision especially appears to act as a protagonist for making exceptions to the constitutional guarantees. Consequently, petitioner has felt that it had a right to

stand up and assert its position on the fact issue raised by the Court of Appeals, but if this Court will not act as the arbiter, petitioner's stand must necessarily be frustrated. It need only be called to this Court's attention that the very first act that this petitioner took in this litigation was to petition to intervene. Across the face of that petition it demanded its right to a trial by jury. By all known rules of practice, this action would have been sufficient for this petitioner to have preserved its right to a jury trial. A denial of it in spite of this precaution was actually a taking away of that right.

Consequently, this Court is respectfully urged to reconsider the question of preserving this all important right to a litigant, to correct the record made by the decisions below and to assert its constitutional power as keeper of the guarantees, to enforce and to guarantee the rights set forth in the Constitution. This position is particularly necessary these days in light of the attack upon our form of government from many sources. This will be another re-affirmation of which there cannot be too many, of the guarantees which are made available to the people of this great country. Conversely, a refusal is not only repugnant to the Constitution and to the concept of Rule by Law, but it is fodder for our true enemies. You can hear them scornfully shout with sarcasm concerning our erstwhile sacrosanct rights and privileges. "Constitutional guarantees? Government by law? There are no such." They need not go far for proof.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

Certification of Counsel.

I hereby certify that the foregoing is presented in good faith and not for delay, and that the same is restricted to the grounds above specified which were not considered heretofore by this Court.

ANTHONY B. CATALDO,
Counsel for Petitioner.